2000

Greg F. Knight, Steve Hall, Roy Neizer, and Brock Hudson v. Salt Lake County : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

GREG F. KNIGHT, **STEVE HALL**, **ROY NEIZER** and **BROCK HUDSON**, personally and on behalf of a class of persons similarly situated,	:	**REPLY BRIEF OF APPELLANTS**
Plaintiffs/Appellants,	:	Case No. 20000864-CA
vs.	:	Priority number 15.
SALT LAKE COUNTY, a governmental entity,	:	
Defendant/Appellee.	:	

AN APPEAL FROM SUMMARY JUDGMENT ENTERED BY THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, SALT LAKE DEPARTMENT, Hon. David Young, Judge Presiding
(Trial Court Case No. 97-090-7950 CV)

BRIAN M. BARNARD USB # 0215
JAMES L. HARRIS, JR. USB # 8204
UTAH LEGAL CLINIC
Attorneys for Plaintiffs/Appellants
214 East Fifth South Street
Salt Lake City, Utah 84111-3204
Telephone: (801) 328-9531

DAVID YOCOM
Salt Lake County District Attorney
JOHN SOLTIS & VALERIE WILDE
Deputy District Attorneys
Attorneys for Defendant/Appellee
2001 South State Street, South Building
Salt Lake City, Utah 84190
Telephone: (801) 468-2607

ORAL ARGUMENT REQUESTED

IN THE UTAH COURT OF APPEALS

GREG F. KNIGHT, **STEVE HALL**, **ROY NEIZER** and **BROCK HUDSON**, personally and on behalf of a class of persons similarly situated,	:	**REPLY BRIEF OF APPELLANTS**
Plaintiffs/Appellants,	:	Case No. 20000864-CA
vs.	:	Priority number 15.
SALT LAKE COUNTY, a governmental entity,	:	
Defendant/Appellee.	:	

AN APPEAL FROM SUMMARY JUDGMENT ENTERED BY THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, SALT LAKE DEPARTMENT, Hon. David Young, Judge Presiding
(Trial Court Case No. 97-090-7950 CV)

BRIAN M. BARNARD USB # 0215
JAMES L. HARRIS, JR. USB # 8204
UTAH LEGAL CLINIC
Attorneys for Plaintiffs/Appellants
214 East Fifth South Street
Salt Lake City, Utah 84111-3204
Telephone: (801) 328-9531

DAVID YOCOM
Salt Lake County District Attorney
JOHN SOLTIS & VALERIE WILDE
Deputy District Attorneys
Attorneys for Defendant/Appellee
2001 South State Street, South Building
Salt Lake City, Utah 84190
Telephone: (801) 468-2607

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE UTAH COURT OF APPEALS

GREG F. KNIGHT, **STEVE HALL**, **ROY NEIZER** and **BROCK HUDSON**, personally and on behalf of a class of persons similarly situated,	:	**REPLY BRIEF OF APPELLANTS**
Plaintiffs/Appellants,	:	Case No. 20000864-CA
vs.	:	
SALT LAKE COUNTY, a governmental entity,	:	
Defendant/Appellee.	:	

AN APPEAL FROM SUMMARY JUDGMENT ENTERED BY THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, SALT LAKE DEPARTMENT, Hon. David Young, Judge Presiding
(Trial Court Case No. 97-090-7950 CV)

Plaintiffs/Appellants (hereinafter "Plaintiff-Officers") submit the following reply brief in further support of their appeal from the judgment below:

ISSUES PRESENTED FOR REVIEW

The County's gratuitous recitation of its Issues Presented for Review in this appeal is not helpful. Salt Lake County has not filed an appeal. Plaintiff-Officers' opening brief sets forth the issues presented for review and now before this Court.

STATEMENT OF FACT REPLY[1]

The County states that it adopted policies regarding pay practices. Brief of Appellee Salt Lake County (hereinafter "County Appellee Brief"), 7. None of those policies control or relate to the issue at hand. No policy forces Plaintiff-Officers to work without pay. Neither the Sheriff's Office Policy and Procedures nor the Salt Lake Personnel Policies direct that the Plaintiff-Officers should not be paid for briefings.

Rather, the decision not to pay for the briefings was an erroneous interpretation by the jail commanders. Aff. of Biesele, 11/21/1996, ¶ 12 (R. 730). Plaintiff-Officers were ordered by supervisors not to record the briefing time on their time cards. Interr. Answers Hudson, 8-9, ¶ 11 (R. 688-689); 2nd Depo. of Cunningham, 18:14 to 19:6 (R. 723). Those Plaintiff-Officers who did record the briefing time on their time cards were ordered by their supervisors to remove that time from the time cards.[2] Interr. Answers Hudson, 8-9, ¶ 11 (R. 688-689); 2nd Depo. of Cunningham, 19:17 to 20:23 (R. 723).

---

[1] Many of the County's "facts" are in reality argument. Accordingly, much of Plaintiff-Officers' reply to these "facts" is contained within the Argument section herein.

[2] When the County became aware of that erroneous interpretation and the non-payment, the County partially corrected the error and paid most jail staff and plaintiff class members for the briefing time worked retroactively to February 1, 1994. County Appellee Brief, at 9; see also Appendix E to the County's Brief, No. 1 page 4.

REPLY ARGUMENT

I. PLAINTIFF-OFFICERS' WAGE CLAIM IS A CONTRACTUAL CLAIM.

A. Plaintiff-Officers Do Not Assert That County Policies Form A Contract.

The County mis-states Plaintiff-Officers' position herein. County Appellee Brief, 10. Plaintiff-Officers do not assert that county policies form a contract. Rather, Plaintiff-Officers have written contracts which modify merit status and county policies. In particular, Plaintiff-Officers have written contracts which set forth that each would work for Salt Lake County and the County would pay for their services. These documents set forth the nature of the employment, starting date of employment, rate of pay, job code and other information establishing the nature of employment.[3]

B. There Are No Public Policy Concerns In The Instant Case.

The County relies upon public policy concerns regarding the terms of civil service employment; the County states, generally, that "[i]t is well settled that the terms and conditions of public service in office or employment rest in legislative policy rather than contractual obligations, and hence may be changed."

---

[3] The County insists that the Plaintiff-Officers' "employment rights are strictly a creation of statute and County policy." County Appellee Brief, 13. However, there are specific terms of the employment agreements that are found neither in statute nor policy. These terms are set forth only in the Plaintiff-Officers' employment contract.

County Appellee Brief, 11 (citing Hom v. Utah Department of Public Safety, 962 P.2d 95, 101 (Ut. App. 1998) (a copy of which is attached hereto as Attachment "A")). However, the facts herein do not implicate a change in the terms of employment. Plaintiff-Officers have at no time requested a change in the terms of employment. Nor has the County sought a change. Rather, Plaintiff-Officers seek to enforce terms that have remained constant: compensation for service rendered. That public policy rationale is irrelevant in the instant case.

C. Utah Law Holds that Contractual Rights Co-Exist With Statutory Rights.

The County asserts that courts have "struggled" to apply contract commitments to civil servants. This statement is incorrect. Rather, the courts have categorized different rights and applied different analysis depending on the right being enforced. For example, Plaintiff-Officers are subject to statutory limitations when the county cannot (or does not) fund merit pay increases for a particular year. Weese v. Davis County Comm'n, 834 P.2d 3 (Utah 1992). Plaintiff-Officers are subject to statutory limitations should the county re-evaluate a particular job or perform a county-wide reassessment of all jobs. See Thurston v. Box Elder County, 835 P.2d 165 (Utah 1992); and, Thurston v. Box Elder County, 892 P.2d 1034 (Utah 1995). Termination of government employment is subject to statutory regulation, and administrative procedure. Hom. County

commissions cannot enter into contracts guaranteeing future wage increases for employees. Weese; Utah Const. art. XIV, § 3. A county cannot enter into a contract guaranteeing future or continued employment. Utah Const. art. XIV, § 3. Every contract entered with Salt Lake County must be in writing. Salt Lake County Ordinance § 2.04.100. Finally, any contract entered beyond the authority granted to a County is null and void. Weese.

The foregoing cases, however, have never held that county employees do not have contractual employment or contractual employment rights.[4] These cases acknowledge that counties can contract with employees. The court must look to the right that is being enforced to see whether a statutory or contractual analysis applies. Plaintiff-Officers' wage claim is a contractual claim and subject to a contractual analysis.

As noted, Hom held that as to certain aspects of government employment (i.e., termination of employment), there are statutes, rules and regulations that govern. The facts of the instant case are easily distinguishable. There are no statutes, policies, or

---

[4] Indeed, the County explicitly acknowledges Utah cases which hold that contractual rights co-exist with statutory rights. See County Appellee Brief, 12 n.5 ("public employees have a contractual right to accrued benefits"; "personnel policy manuals or other agreements between state agencies and their employees can create contractual rights in addition to public employees' underlying statutory rights"). The general statement that the County keeps repeating ("Jailers are statutory employees.") is not accurate nor helpful.

administrative rules applicable to the situation at bar. Although administrative rules and a procedure were available for the appellant in Hom to challenged his termination, there are no similar applicable administrative rules or procedures for the jailers to force the county to pay for time worked (and for which the jail commanders erroneously declined to pay). Therefore, the analysis in Hom is of limited use herein.

D. Plaintiff-Officers Have Written Employment Contracts.

The County contends that the documents Plaintiff-Officers introduced to show a written contract are documents which evidence their statutory merit employment status. County Appellee Brief, 14. Such an argument assumes that the two categories of rights (contractual and statutory) are mutually exclusive. There are not. They coexist concurrently. The statutory and contractual rights of state or county employees are concomitant.

The County asserts that Plaintiff-Officers "failed to meet their burden of establishing a written contract 'adding to' or 'altering' their statutory employment relationship with the County." County Appellee Brief at 18 (a reference to the Hom case). The County asserts that the Plaintiff-Officers "were unable to produce signed written employment agreements evidencing an intent to create employment by contract and the court correctly found that the employment documents did not alter or

add to the terms and conditions of their statutory public employment." County Appellee Brief, 15.

These statements are inaccurate. Plaintiff-Officers produced documents to establish written contracts whereby each would work for Salt Lake County and the County would pay for their services. Those documents include Letter from Sheriff N.D. "Pete" Hayward to Brock E. Hudson of January 11, 1990 (R. 130), Letter from Sheriff Aaron D. Kennard to Roy David Neizer of June 1, 1991 (R. 131), Notice of Personnel Action (R. 132 & 133), Salt Lake County Deputy Sheriff's Merit Service Commission Policies and Procedures (R. 134-140 (policy related to payment of wages)), and, written agreements to follow such rules (R. 141). These various documents combined constitute an employment contract based upon written instruments. These documents set forth the nature of the employment, starting date of employment, rate of pay, job code and other information establishing the nature of employment. Absent these written documents, the terms and conditions of Plaintiff-Officers' employment are not determined.[5]

The County asserts that Plaintiff-Officers have presented no "integrated writing which establishes a contract . . . ." County Appellee Brief, 9. An "integrated writing" is defined as "The writing or writings adopted by the parties to an agreement as the

---

[5] For example, Plaintiff-Officers' individual hourly rates and job levels are set not by statute, but rather by these "integrated" written agreements between employee and employer.

final and complete expression of the agreement." Black's Law Dictionary 809 (6th ed. 1990). Utah law describes an "integrated writing" as follows:

> where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985) (quoting Restatement (Second) of Contracts § 209(3) (1981)).

Herein, each Plaintiff-Officer has written documents establishing a contract whereby each would work for Salt Lake County and the County would pay for their services. Those documents are identified above. Those various documents combined constitute an employment contract based upon written instruments. Those documents are the "integrated instruments" which form the contract governing Plaintiff-Officers' compensation and employment.

E. Plaintiff-Officers' Written Contracts Comply With County Ordinances.

Salt Lake County Ordinance § 2.04.100 declares that all county contracts must be in writing. Nevertheless, the County claims that this ordinance does not apply herein.[6] The County asserts that the ordinance "is part of larger procurement process." County Appellee Brief, 15. A review of the ordinance,

---

[6] The County cites no authority to support this claim.

its context and location within the county code reveals no such larger process. Even if that were true, such a "larger process" does not preclude application to employment contracts. Nothing in that ordinance indicates that it does not apply to employment. Indeed, every Plaintiff-Officer has a written employment contract signed by all three county commissioners, giving strong indication that the ordinance does apply to the situation herein.

F. Other Jurisdictions Distinguished.

Finally, the County cites, without adequate analysis, two (2) cases from other jurisdictions to support its contention that all public employees are statutory employees: Chotkowski v. State of Connecticut, 240 Conn. 246, 690 A.2d 368 (Conn. 1997), and National R. Passenger Corp. v. Atchinson, Topeka & Sante Fe Railway Co., 470 U.S. 451 (1985). These two (2) cases are inapposite to the case at bar.

Chotkowski involved a state employee who claimed "the state of Connecticut improperly reduced his salary while he was employed at the state Veteren's Hospital . . . ." 690 A.2d at 370. In Connecticut, "state employees serve by appointment, and 'their entitlement to pay and other benefits must be determined by reference to the statutes and regulations governing [compensation], rather than to ordinary contract principles.'" Id. at 380 (bracket in original - citations omitted). In the case at bar, there are no statutes, policies, procedures, etc.,

that determine Plaintiff-Officers' compensation. The determination of Plaintiff-Officers' compensation is found in the contractual documents noted above. Furthermore, no overt action by the County forces Plaintiff-Officers to work uncompensated (unlike the explicit determination to reclassify and reduce salary in Chotkowki). The rules, policies and procedures of the County mandate that Plaintiff-Officers be paid for time worked.

National R. Passenger Corp. v. Atchinson, Topeka & Sante Fe Railway Co., 470 U.S. 451 (1985), was an attempt by several railroads to determine that the Rail Passenger Service Act of 1970 constituted a contract and/or created contractual obligations with the United States. The Supreme Court ultimately determined that the Act did not create a binding obligation. Herein, Plaintiff-Officers do not argue that a certain legislative act or ordinance of Salt Lake County constitutes a contract. Rather, Plaintiff-Officers assert that they have contractual rights concomitant with their statutory rights. The terms and conditions of Plaintiff-Officers' compensation are set forth largely in the contractual documents noted above, not by any legislative or regulatory action.

Therefore, this Court should determine Plaintiff-Officers' wage claim is based upon the written contracts of the parties, and that the lower court erred in ruling that appellants were not contractual employees.

II. THERE ARE NO STATUTES, POLICIES AND/OR PROCEDURES TO JUSTIFY NON-COMPENSATION OF TIME WORKED.

The County states that neither the statute nor the policies mandated by statute create written employment with public employees. County Appellee Brief, 16. While this is a true statement, it ignores the fact that Plaintiff-Officers have concomitant contractual rights. Furthermore, it ignores the fact that the County's policies and procedures mandate payment for time worked.

The County asserts that County rules required Plaintiff-Officers to record their time worked in 15 minutes increments. County Appellee Brief, 17. Such a policy does not mean that the county could require employees to work fourteen (14) minutes extra every day without pay. There is no policy that requires Plaintiff-Officers to work uncompensated for <u>any</u> amount of time.

The County's repeated citation to a rule about "overtime" (County Appellee Brief, 17-19) is not helpful. Sheriff's Office Policy and Procedure ("SOPP") 2-5-03.02(6), Appendix B to County Appellee Brief. The time at issue, the briefing time, is referred to in the rules as "excess time." SOPP 2-5-03.02(6). Plaintiff-Officers receive their normal hourly rate for "excess time", as opposed to a premium rate (1½ normal hourly rate) for "overtime". SOPP 2-5-03.02(6).

That the County treated "overtime" of less than 15 minutes as *de minimis* and not compensable (County Appellee Brief, 19),

does not alter the fact that plaintiff/jailers were required to work ten (10) minutes of "excess time" on a daily basis for which they should have been compensated under the county's own rules.[7] SOPP 2-5-03.02(6); see also Salt Lake County Deputy Sheriff's Merit Service Commission ("DSMSC") Policy and Procedure # 5105, Attachment "E", Plaintiff-Officers' Opening Brief (R. 134-140).

Salt Lake County asserts that "Since County policy required time to be recorded in 15 minute increments there are no time records to determine if and when employees reported to briefing session." County Appellee Brief, 5. Plaintiff-Officers were required to be at work ten minutes early before each and every shift. No further records are necessary other than the employment records of each class member.

The County was able to calculate and pay the briefing time retroactively for two (2) years as per the Villalobos action. County Appellee Brief, 19. Using the same methods and comparable records, the County knows what extra time Plaintiff-Officers worked for which they should be paid. In addition, the payments made in the Villalobos case are an admission by the County of its non-payment for work actually performed by those Plaintiff-Officers.

---

[7] The County admits that it should have paid Plaintiff-Officers for the briefing time. The County states, "After the Villalobos lawsuit was filed, the County realized that briefing sessions should be compensable . . . ." County Appellee Brief, 19.

Finally, the County ignores the fact that plaintiff/jailers were told not to record or submit briefing time on their time sheets. Plaintiff-Officers Brief of Appellant, 11 ¶ 19. The County is not being entirely forthright by stating that Plaintiff-Officers have been paid "for all hours recorded" (County Appellee Brief, 19), when the County knows that the Plaintiff-Officers were instructed not to record the briefing time that is the subject matter of this lawsuit.

III. PLAINTIFF-OFFICERS' WAGE CLAIM IS WITHIN THE APPROPRIATE STATUTE OF LIMITATIONS.

The County claims Plaintiff-Officers are attempting to extend the FLSA statute of limitations to establish a six (6) year statute of limits. County Appellee Brief, 19. That is not accurate; Plaintiff-Officers make no such claim. Rather, Plaintiff-Officers directly assert a six (6) year statute of limits because their claims herein are based upon written employment contracts. Ut. Code Ann. § 78-12-23(2) (1953 as amended).

Utah Code Ann. § 78-12-26 (4) (1953 as amended) applies to "a liability created by the statutes of this state." No statute of this state creates the liability of Salt Lake County to pay wages to the Plaintiff-Officers. The liability or obligation of the County to pay wages is based upon the written employment contracts between the County and the Plaintiff-Officers.

Therefore, the lower court's invocation of Utah Code Ann. § 78-12-26 (4) (1953 as amended) is not supported by any case law or authority.

CONCLUSION

The County's repeated general claim "the terms and conditions of public service in office or employment rest in legislative policy rather than contractual obligations" (County Appellee Brief, 20) is much too broad and is thus not supported by the case law within or without Utah. This Court should determine that the documents presented by Plaintiff-Officers establish written employment contracts; that Plaintiff-Officers were employees of Salt Lake County based upon written employment contracts thereby subjecting their wage claims to a six-year statute of limitations; and remand the case below for an accounting of wages owed to named plaintiffs and plaintiff class.

RESPECTFULLY SUBMITTED this 8th day of JUNE 2001.

UTAH LEGAL CLINIC
ATTORNEYS FOR PLAINTIFFS/APPELLANTS

by _____
BRIAN M. BARNARD
JAMES L. HARRIS, Jr.

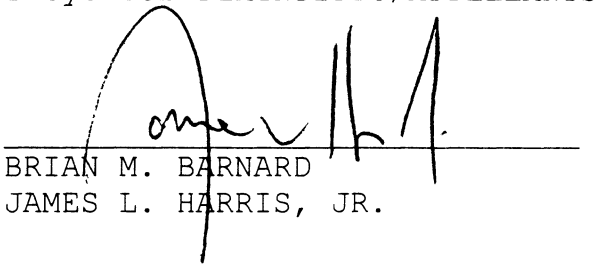
CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four (4) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS** to:

DAVE YOCOM
Salt Lake County District Attorney
JOHN SOLTIS & VALERIE WILDE
Deputy District Attorneys
Attorneys for Appellee, Salt Lake County
2001 South State Street, South Building
Salt Lake City, Utah 84190

on the 8th day of JUNE, 2001, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for PLAINTIFFS/APPELLANTS

by: 

BRIAN M. BARNARD
JAMES L. HARRIS, JR.

APPENDIX/ATTACHMENTS

Attachment "A": Hom v. Ut. Dept. of Pub. Safety, 962 P.2d 95 (Ut. App. 1998).

Michael W. HOM, Plaintiff
and Appellant,

v.

UTAH DEPARTMENT OF PUBLIC SAFETY, a governmental agency; Cherie Ertel; Douglas Bodrero; A. Roland Squire; Arthur Hudachko; Bart Blackstock; and John Does I through X, Defendants and Appellees.

No. 970592–CA.

Court of Appeals of Utah.

July 16, 1998.

Former employee of Department of Public Safety brought action against Depart-

402(25). Under the plain language of the definitions contained in the Act, V–1 is a responsible party if it is the owner of a UST facility or has experienced releases. Although V–1 may not be *the only* responsible party, it is liable for the abatement if it is at least *a* responsible party under the Act. Cf. *DEQ v. Wind River Petroleum*, 881 P.2d 869, 873 (Utah 1994) (holding Utah Hazardous Substances Mitigation Act, Utah Code Ann. §§ 19–6–301 to –325 (1991 and Supp.1993), imposes strict liability on owner or operator of facility as responsible party).

ment and individuals, alleging breach of employment contract and disability discrimination. The District Court, Henriod, J., granted defendants' summary judgment motion, and former employee appealed. The Court of Appeals, Billings, J., held that: (1) former employee failed to exhaust his administrative remedies, and thus, Court of Appeals lacked jurisdiction over Personnel Management Act claim, and (2) discovery rule did not apply to toll four-year limitations period applicable to Rehabilitation Act claim.

Affirmed.

1. Officers and Public Employees ⇐72.41(2)

Court of Appeals could consider for first time on appeal whether former employee of Department of Public Safety failed to exhaust his administrative remedies under Personnel Management Act, which would deprive Court of subject matter jurisdiction over action. U.C.A.1953, 67–19–1 et seq.

2. Appeal and Error ⇐782

When a matter is outside the court's jurisdiction the court retains only the authority to dismiss the action.

3. Administrative Law and Procedure ⇐229

Parties protesting agency actions must generally exhaust all available administrative remedies before seeking judicial relief.

4. Officers and Public Employees ⇐72.41(2)

Wrongful termination claim brought by former employee of Department of Public Safety was action in vindication of rights created by Personnel Management Act, and thus, Grievance and Appeal Procedures Act required employee to pursue grievance through administrative appeal, where employee failed to argue that Department entered in to any contract with him that altered or added to terms and conditions of public employment included in Personnel Management Act and implementing regulations. U.C.A. 1953, 67–19a–401(4)(a).

5. Officers and Public Employees ⇐72.41(2)

Former employee of Department of Public Safety, who brought action seeking vindication of Personnel Management Act rights, failed to exhaust his administrative remedies, and thus, Court of Appeals lacked jurisdiction over Act claim where employee allowed his Career Service Review Board appeal to be dismissed for failure to prosecute. U.C.A. 1953, 67–19a–401(4)(a).

6. Civil Rights ⇐210

Utah's four-year statute of limitations applicable to personal injury actions generally applies to Rehabilitation Act claims. Rehabilitation Act of 1973, § 2 et seq., 29 U.S.C.A. § 701 et seq.

7. Appeal and Error ⇐842(1)

Limitation of Actions ⇐199(1)

Issue of whether the discovery rule applies to toll the statute of limitations is a question of law, and thus, the Court of Appeals needs to show no deference to the trial court's ruling on appeal, but reviews the ruling for correctness.

8. Limitation of Actions ⇐95(1)

"Discovery rule" tolls the running of a statute of limitations in some instances when a plaintiff was not in a position to know of the existence of the cause of action before the end of the limitations period.

See publication Words and Phrases for other judicial constructions and definitions.

9. Limitation of Actions ⇐95(1), 104(1)

"Discovery rule" tolls a statute of limitations in the following three exceptional situations: (1) when the discovery rule is mandated by statute; (2) when a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct; and (3) when the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action.

10. Limitation of Actions ⇐104(1)

Discovery rule did not apply to toll four-year limitations period applicable to former employee's Rehabilitation Act claim, based upon employer's alleged concealment of existence of claim, where evidence indicated employee's termination was based on his job performance, rather than on any perceived mental disability, and employee failed to allege that coemployees took affirmative steps to conceal claim. Rehabilitation Act of 1973, § 2 et seq., 29 U.S.C.A. § 701 et seq.

11. Limitation of Actions ⇐104(1)

Under the concealment prong of the discovery rule for tolling the running of a statute of limitations, a plaintiff must establish a prima facie case that defendants actively concealed the existence of a cause of action and that, given defendants' actions, a reasonable plaintiff would not have discovered the claim earlier.

12. Limitation of Actions ⇐95(15)

Discovery rule did not apply to toll four-year limitations period applicable to former employee's Rehabilitation Act claim, based upon exceptional circumstances, where employee knew all facts supporting his claims within limitations period and these facts were sufficient to put employee on notice that his superiors believed he was unstable. Rehabilitation Act of 1973, § 2 et seq., 29 U.S.C.A. § 701 et seq.

13. Limitation of Actions ⇐95(1)

To meet the exceptional circumstances prong of the discovery rule for tolling the running of a statute of limitations, a plaintiff must show that he did not know of and could not reasonably have known of the existence of the cause of action in time to file a claim within the limitations period; once the plaintiff has made this showing, the court must apply a balancing test to determine whether a case presents exceptional circumstances that render the application of a statute of limitations irrational or unjust.

14. Limitation of Actions ⇐95(1)

Simple ignorance of or obliviousness to the existence of a cause of action will not prevent the running of a statute of limitations.

L. Zane Gill, Salt Lake City, for Appellant.

Jan Graham and Debra J. Moore, Salt Lake City, for Appellees.

Before BENCH, BILLINGS and ORME, JJ.

BILLINGS, Judge:

Michael Hom appeals the trial court order granting summary judgment in favor of the Utah Department of Public Safety (the Department) and individual defendants in Hom's suit for breach of employment contract, breach of implied covenant of good faith and fair dealing, and disability discrimination. We affirm.

FACTS

Because this is an appeal from a grant of summary judgment, we recite the facts in the light most favorable to the nonmoving party. *See Glover v. Boy Scouts of Am.*, 923 P.2d 1383, 1384 (Utah 1996). Hom presents the following account of the events leading up to and surrounding his termination from the Department.

Hom was hired in 1985 as a programmer/analyst. Although Hom was employed by the Department and had access to sensitive law enforcement information, he was a career civil servant and not a sworn police officer. His primary responsibilities were to provide technical assistance and to remain on call to deal with computer problems for the Bureau of Criminal Investigation (BCI) and the Driver License Division. From 1985 through 1987, Hom performed satisfactorily and received positive evaluations on his job performance. However, Hom concedes that during this period his supervisor advised him in job evaluations that he should try to improve his "political and people skills."

In 1987, Hom was appointed the technical subcommittee chairperson for a "Request for Proposal Committee" (RPC) formed by the Department to select a vendor for a new computer system. Hom's RPC duties were in addition to his regular work. Hom lost sleep, frequently worked twenty-hour days,

and felt stress and pressure because of overwork. As the RCP selection process progressed, Hom became convinced that his fellow committee members were acting illegally to favor certain vendors. Hom confronted the other RPC members about this perceived illegal conduct. As a result of these confrontations, several coworkers lodged complaints against Hom, and he was banned from the Driver License Division offices.

During the RPC dispute, Hom also became involved in a dispute with his direct supervisor about overtime hours. Hom filed a grievance on this issue and won an award of additional overtime. Hom used the overtime to take a leave of absence, and he was away from the Department from November 1988 to May 1989.

In July 1989, Hom was assigned to supervise the Driver License Division annual job run, a major annual event in which Department personnel purged the Driver License Division computer files. Hom encountered problems during the job run, and these problems led to a second internal affairs investigation. As a result of the job run incident, Hom's immediate supervisor issued a letter of intent to reprimand and met with Hom to explain the reasons for the reprimand. The supervisor was concerned with Hom's refusal to obey the supervisor's direct orders, and Hom's inability to provide a satisfactory explanation for the job run failure. Hom's supervisor was also concerned because Hom had ignored explicit instructions during the job run. The supervisor informed Hom that he could discuss disagreements and alternatives with supervisors, but in the future Hom would be expected to carry out supervisors' instructions even if he disagreed with them. Hom objected to this requirement. Hom then made a statement about having the power to crash and disable the Department computer system. Hom asserts that he intended this statement as a claim that he would not follow an order that would crash the system. However, Hom's supervisor interpreted it as a threat that Hom would crash the system.

After this meeting, Hom was placed on temporary leave. On his return, Hom met with the BCI chief to discuss the internal affairs investigation and Hom's own plans to file a grievance over the job run incident. Hom alleges that the Department head attempted to dissuade him from prosecuting his grievance and "warned him to work things out with" his supervisor. At this meeting, Hom made another statement about his power to damage the computer system. While Hom remembers this comment as a response to a theoretical question, the BCI chief remembers it as "coming out of the blue" and sounding like a threat. Shortly after making this comment, Hom broke down and began crying uncontrollably. The BCI chief later stated that he felt Hom was "on a downward spiral" and had become emotionally unstable. However, Hom states the BCI chief never recommended that he seek counseling.

During the subsequent internal affairs investigation, Hom's superiors concluded that he was responsible for the job run failure, had acted insubordinately, and had perjured himself. Hom was dismissed from the Department in March 1990. The Department gave the following reasons for the dismissal: 1) Hom was perceived to be a security threat, 2) Hom had committed perjury, 3) Hom had committed malfeasances and misfeasance, and 4) Hom had been insubordinate.

Hom appealed his termination administratively under the Utah State Personnel Management Act (Personnel Management Act), but his administrative appeal was ultimately dismissed for lack of prosecution. In 1994, Hom filed suit against the Department, claiming that his dismissal violated the Personnel Management Act and Department of Human Resources (DHR) regulations implementing that Act. In 1995, Hom amended his complaint to add a disability discrimination claim under the Federal Vocational Rehabilitation and Other Rehabilitation Services Act of 1978 (the Rehabilitation Act), 29 U.S.C. §§ 701 to 796 (Supp.1998). The trial court granted summary judgment in favor of the Department, dismissing both claims. Hom now appeals.

ANALYSIS

Hom presents two arguments on appeal. First, he argues the trial court erred in

barring his wrongful termination claim under the three-year statute of limitations for violations of rights created by statute. He asserts that his suit was an action for breach of contract subject to the six-year statute of limitations for claims arising out of contracts in writing under Utah Code Ann. § 78–12–23(2) (1996). Second, Hom argues the trial court erred in refusing to toll the statute of limitations on his disability discrimination claim under the discovery rule. "Because summary judgment presents only a question of law, we review the trial court's determinations under a standard of correctness, according no deference to the trial court's legal conclusions." *Macris & Assocs., Inc. v. Images & Attitude*, 941 P.2d 636, 639 (Utah Ct.App.1997).

I. Did Hom Fail to Exhaust His Administrative Remedies?

[1, 2] As a threshold issue, we first address the Department's argument that we lack jurisdiction over this case because Hom has failed to exhaust his administrative remedies under the Personnel Management Act. Hom argues that we cannot consider this issue because the Department did not raise it before the trial court. We disagree. If Hom has failed to exhaust his administrative remedies, then we lack subject matter jurisdiction, and we must dismiss the case "[r]egardless of who raises the issue." *Maverik Country Stores, Inc. v. Industrial Comm'n*, 860 P.2d 944, 947 (Utah Ct.App.1993); *see also Hi-Country Homeowners Ass'n v. Public Serv. Comm'n*, 779 P.2d 682, 684 (Utah 1989) (holding court had no subject matter jurisdiction where plaintiff failed to timely appeal an agency order); *Heinecke v. Department of Commerce*, 810 P.2d 459, 462–64 (Utah Ct. App.1991) (addressing defense of failure to exhaust remedies though raised for first time at oral argument on appeal). "When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah Ct.App.1989).

[3] Under Utah law, parties protesting agency actions must generally exhaust all available administrative remedies before seeking judicial relief. "The basic purpose underlying the doctrine of exhaustion of administrative remedies 'is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own error so as to moot judicial controversies.' " *Maverik Country Stores*, 860 P.2d at 947 (quoting *Parisi v. Davidson*, 405 U.S. 34, 37, 92 S.Ct. 815, 818, 31 L.Ed.2d 17 (1972)); *accord State Farm Mut. Auto. Ins. Co. v. Utah Indus. Comm'n*, 904 P.2d 236 (Utah Ct.App.1995).

[4, 5] In this case, the Grievance and Appeal Procedures Act, Utah Code Ann. §§ 67–19a–101 to –408 (1996), provided a clearly available administrative remedy. The Grievance and Appeal Procedures Act provides a formal review process for career service employee dismissals. *See* Utah Code Ann. § 67–19a–401 (1996). Furthermore, the Act explicitly prohibits judicial review of a career service employee's grievance when the employee has failed to pursue the grievance in a timely manner:

> (4)(a) Unless the employee meets the requirements for excusable neglect established by rule, if the employee fails to process the grievance to the next step within the time limits established in this part, he has waived his right to process the grievance *or to obtain judicial review of the grievance.*

Id. § 67–19a–401(4)(a) (1996) (emphasis added).

Hom failed to complete the administrative appeal process. Hom initially appealed his dismissal to the Career Services Review Board (the Board) under the Grievance and Appeal Procedures Act. However, Hom failed to actively pursue his administrative appeal. Thus the Board dismissed Hom's appeal in 1993 for failure to prosecute.

Hom attempts to dodge his jurisdictional problem by casting his claim as a civil action for breach of contract, rather than an action to vindicate rights created by the Personnel Management Act. Hom argues that the Personnel Management Act and its implementing regulations created a contract of employment in writing that was sufficient to give rise to a civil suit for breach of contract.

Hom relies on several Utah cases to argue by analogy that the Personnel Management Act and implementing regulations create separate contractual rights for state employees. These cases fall into two groups. The first group includes cases holding that public employees have a contractual right to accrued retirement benefits. *See Ellis v. State Retirement Bd.*, 757 P.2d 882, 886 (Utah Ct. App.1988), *aff'd*, 783 P.2d 540 (Utah 1989); *Newcomb v. Ogden City Pub. Sch. Teachers' Retirement Comm'n*, 121 Utah 503, 508–10, 243 P.2d 941, 944 (1952). The second group includes cases holding that personnel policy manuals or other agreements between state agencies and their employees can create contractual rights in addition to the public employees' underlying statutory rights. *See Thurston v. Box Elder County*, 835 P.2d 165, 169 (Utah 1992) (*Thurston I*); *Piacitelli v. Southern Utah State College*, 636 P.2d 1063, 1065–67 (Utah 1981). Both groups of cases are clearly distinguishable from Hom's case.

Hom relies first on Utah cases holding that public employees have a contractual right to vested retirement benefits that cannot be abrogated by new state legislation. Under Utah law, public pension and retirement systems give rise to vested contractual rights. *See, e.g., Ellis*, 757 P.2d at 885–86; *Driggs v. Utah Teacher's Retirement Bd.*, 105 Utah 417, 421–23, 142 P.2d 657, 659–60 (1943). Hom argues that his right to continued employment under the Personnel Management Act is comparable to a state employee's right to vested retirement benefits.

Utah and other jurisdictions have consistently treated vested retirement and disability benefits as an exception to the general rule that civil servants' employment rights are statutory rather than contractual. *See, e.g., Miller v. California*, 18 Cal.3d 808, 135 Cal.Rptr. 386, 557 P.2d 970, 973 (1977); *Gili v. Oregon State Univ.*, 49 Or.App. 379, 619 P.2d 938, 939–40 (1980); *Personnel Division v. St. Clair*, 10 Or.App. 106, 498 P.2d 809, 811 (1972). We acknowledged this distinction in *Ellis*, 757 P.2d at 886, where we stated that a public employee obtains vested rights to retirement benefits "only when he has satisfied all conditions precedent to receiving his benefit, i.e., he has attained retirement age, or has been medically disabled."

The crux of *Ellis* and other public retirement benefits cases was whether benefits earned by retired employees under a previous legislative scheme could be diminished or abrogated by new legislation. Hom's case is not comparable to these cases because it is a straightforward dispute about whether the Department met the requirements of the Personnel Management Act when it dismissed Hom for cause. Thus we conclude that our past treatment of vested retirement benefits has no bearing on our characterization of Hom's claim of wrongful termination under the Personnel Management Act.

In addition to the retirement benefits cases, Hom cites several Utah cases where agency personnel manuals and similar documents were held to create contractual employment rights separate from the underlying statutory rights of public employees. *See Thurston I*, 835 P.2d at 168; *Thurston v. Box Elder County*, 892 P.2d 1034, 1037–39 (Utah 1995) (*Thurston II*); *Piacitelli*, 636 P.2d at 1065–67. Hom claims these cases show that the Personnel Management Act and implementing regulations constitute a written employment contract between Hom and the Department. We disagree.

In *Piacitelli*, the Utah Supreme Court addressed a claim by a counselor at a state college that his termination violated his due process rights as set forth in the college's personnel manual. *See Piacitelli*, 636 P.2d at 1064. However, the employee in *Piacitelli* was explicitly exempt from the Personnel Management Act, and the court found that the college's personnel manual had created a separate employment contract in place of the statutory scheme. *See id.* at 1066. Under these facts, the court found that Piacitelli's employment relationship with the college was governed by the college's personnel manual and was therefore contractual rather than statutory. *See id.* Thus, *Piacitelli* involved an exempt employee with a written contract separate from the Personnel Management Act, and it has no bearing on Hom's claim that the Personnel Management Act and implementing regulations constitute an actionable employment contract.

In *Thurston I* and *Thurston II*, a county employee sued for wrongful termination, casting his suit as an action for breach of an employment contract created by the county personnel manual. *See Thurston I*, 835 P.2d at 167. The Utah Supreme Court remanded the case, holding that the action was properly a statutory claim under the Personnel Management Act. *See id.* at 170. On remand the county argued that it was exempt from the Personnel Management Act because it had fewer than 130 employees. However, the court below refused to overrule the supreme court under the law of the case doctrine. *See Thurston II*, 892 P.2d at 1037. We conclude that *Thurston I* and *Thurston II* do not establish, as Hom claims, that public employees' wrongful termination actions should be treated as suits for breach of contract.

Other jurisdictions faced with similar claims have uniformly rejected the proposition that a public employment act and implementing regulations, without more, create a contractual right to continued public employment. *See, e.g., Thorin v. Bloomfield Hills Bd. of Educ.*, 203 Mich.App. 692, 513 N.W.2d 230, 237 (Mich.Ct.App.1990) (Corrigan, P.J., concurring) (stating recognition of contractual claims "in the public sector would have significant adverse policy ramifications ... [and] lead to the denial of the right of the people, through their elected representatives, to decide crucial political questions"); *Smith v. City of Newark*, 128 N.J.Super. 417, 320 A.2d 212, 218 (1974), *rev'd on other grounds*, 136 N.J.Super. 107, 344 A.2d 782 (1975) (stating "it is well settled that 'the terms and conditions of public service in office or employment rest in legislative policy rather than contractual obligations, and hence may be changed' " (citation omitted)).

Hom has not argued that the Department entered into any contract with him that altered or added to the terms and conditions of public employment included in the Personnel Management Act and implementing regulations. We conclude that Hom's wrongful termination claim is an action in vindication of rights created by the Personnel Management Act. Consequently, the Grievance and Appeal Procedures Act required Hom to pursue his grievance through an administrative appeal. By allowing his Career Service Review Board appeal to be dismissed for failure to prosecute, Hom "waived his right to ... obtain judicial review" of his dismissal. Utah Code Ann. § 67-19a-401(4)(a) (1996). Hom has therefore failed to exhaust his administrative remedies, and we have no jurisdiction to adjudicate his statutory claim.

II. Did the Court Err in Dismissing Hom's Federal Disability Discrimination Claim?

[6, 7] Hom also filed a disability discrimination claim against the Department based on the Rehabilitation Act, 29 U.S.C. §§ 701 to -796 (Supp.1998). The statute of limitations for claims under the Rehabilitation Act is the four-year statute of limitations applicable to personal injury actions generally. *See Baker v. Board of Regents*, 991 F.2d 628, 631-32 (10th Cir.1993) (holding statute of limitations for Rehabilitation Act claims is state limit applicable to personal injury claims). Thus the trial court concluded this claim was barred by the statute of limitations and dismissed it. Hom concedes that the four year statute of limitations applies to this cause of action. However, he argues that the trial court erred in dismissing his claim because the running of the statute of limitations was tolled in his case by operation of the discovery rule. "Because the issue of whether the discovery rule applies to toll the statute of limitations is a question of law, we need show no deference to the trial court's ruling on appeal, but we review it for correctness." *Klinger v. Kightly*, 791 P.2d 868, 870 (Utah 1990).

[8, 9] The discovery rule tolls the running of a statute of limitations in some instances where a plaintiff was not in a position to know of the existence of the cause of action before the end of the limitation period. *See Sevy v. Security Title Co.*, 857 P.2d 958, 961-63 (Utah Ct.App.1993), *vacated in part*, 902 P.2d 629 (Utah 1995). Utah courts will apply the discovery rule in three exceptional situations:

> (1) in situations where the discovery rule is mandated by statute; (2) in situations where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct;

and (3) in situations where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action.

Anderson v. Dean Witter Reynolds, Inc., 920 P.2d 575, 578 (Utah Ct.App.), *cert. denied*, 929 P.2d 350 (Utah 1996).

Hom urges us to apply the discovery rule in this case because 1) other Department employees concealed from him the fact that his mental instability was one reason for his termination, and 2) exceptional circumstances exist in this case that prevented him from discovering the existence of a cause of action under the Rehabilitation Act.

A. Concealment

[10, 11] Under the concealment prong of the discovery rule, a plaintiff must establish a prima facie case that defendants actively concealed the existence of a cause of action and that, given defendants' actions, "a reasonable plaintiff would not have discovered the claim earlier." *Berenda v. Langford*, 914 P.2d 45, 51 (Utah 1996). Hom alleges the following facts to establish a prima facie case of concealment. First, his termination notice did not include mental disability in the list of reasons for his firing. Second, in interrogatories during the early stages of litigation, the defendants did not state that they thought Hom was mentally or emotionally disabled. Third, in depositions later in the litigation, several employees, including Hom's direct supervisor, stated that they began to worry about his mental stability toward the end of his employment because he acted irrational, angry, and "kooky."

These facts are insufficient to establish that defendants took affirmative steps to conceal the existence of a cause of action. First, the evidence indicates that Hom's termination was based on his inability to perform his job or interact acceptably with coworkers, not on any perceived mental disability. Second, Hom has not alleged that any Department employees took affirmative steps to conceal a cause of action. At most, the facts as Hom recounts them suggest that some Department employees thought Hom should seek counseling but did not explicitly tell him so. These facts do not add up to an allegation that Hom's coworkers "took affirmative steps" that would have prevented a reasonable person from discovering this alleged cause of action. *See Berenda*, 914 P.2d at 51. We find this case similar to *Anderson*, where we stated that "the facts underlying the allegation of fraudulent concealment are so tenuous, vague, or insufficiently established that they fail to raise a genuine issue of material fact as to concealment." *Anderson*, 920 P.2d at 580 n. 4. Thus we conclude Hom has not established a prima facie case of concealment.

B. Exceptional Circumstances

[12–14] Hom also argues that his case presents exceptional circumstances that justify application of the discovery rule. To meet the exceptional circumstances prong of the discovery rule, a plaintiff must make two showings. First, he must show that he "did not know of and could not reasonably have known of the existence of the cause of action in time to file a claim within the limitation period." *Sevy*, 857 P.2d at 962. Once a plaintiff has made this threshold showing, the court must then apply a balancing test to determine "whether a case presents exceptional circumstances that render the application of a statute of limitations irrational or unjust." *Id.* at 963. "Simple ignorance of or obliviousness to the existence of a cause of action will not prevent the running of the statute of limitations." *Anderson*, 920 P.2d at 578. "All that is required to trigger the statute of limitations is ... sufficient information to ... put [plaintiffs] on notice to make further inquiry if they harbor doubts or questions." *Berenda*, 914 P.2d at 51.

Hom presents no evidence to support his claim that he did not know or could not reasonably have known of this cause of action. On the contrary, Hom knew all the facts supporting his claims within the statutory period. Hom knew that he was under severe stress. Hom was aware of his deteriorating relations with coworkers. Hom knew of the complaints filed against him and of other employees' statements that they feared he was dangerous. He also knew that he had been banned from the Driver License

Division, and that his superiors had consulted the FBI because they thought he posed a serious security risk. These facts were more than sufficient to put Hom on notice that his superiors believed he was unstable. Even assuming such instability would qualify as an actionable disability, we conclude that the events leading up to and surrounding Hom's dismissal should have put Hom on notice that the Department might have terminated him because of a perceived mental or emotional disorder. Thus we hold the discovery rule does not apply, and Hom's disability discrimination claim is barred by the statute of limitations.

CONCLUSION

We conclude that Hom failed to exhaust his administrative remedies under the Utah State Personnel Management Act. Thus we dismiss Hom's wrongful termination claim for lack of jurisdiction. We also conclude that the discovery rule did not toll the running of the statute of limitations on Hom's disability discrimination claim. Thus we hold that Hom's disability discrimination claim is barred by the statute of limitations.

BENCH and ORME, JJ., concur.